

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
ALBERT J. FIRCHAU and INDUSTRIAL
ROCK PRODUCTS, INC.,

Appellants,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB No. 77-184

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of two \$250 civil penalties, arises from alleged violations of Section 9.03(b) of respondent's Regulation I (opacity). The hearing was held before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, and Chris Smith, Member, convened at Seattle, Washington on April 3, 1978. Hearing examiner William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellants appeared by and through their attorney, Charles K. Wiggins; respondent appeared by and through its attorney, Keith D.

1 McGoffin. Court reporter Cathy Brodie of Seattle recorded the proceedings.

2 Having heard the testimony and considered the exhibits and
3 arguments, and being fully advised, the Hearings Board makes the
4 following

5 FINDINGS OF FACT

6 I

7 Respondent, pursuant to RCW 43.21B.260, has filed with this
8 Hearings Board a certified copy of its Regulation I containing
9 respondent's regulations and amendments thereto, of which official
10 notice is taken.

11 II

12 Appellant, Industrial Rock Products, Inc. owns and controls a
13 gravel crushing operation south of Monroe, Washington and began crushing
14 gravel at that location some two weeks before the events concerned here.
15 The machinery employed consists of a "jaw crusher," which reduces large
16 rock to pieces 8"-10" in size, and a "cone crusher" which further reduces
17 those pieces into gravel. The two crushers are connected by a conveyor
18 belt although they are some 80 feet apart. Appellant had installed a
19 water sprinkling system which, when operated properly, allays the
20 dust emissions which would otherwise result from operation of the two
21 crushers.

22 III

23 On November 4, 1977, both crushers were operating normally, with the
24 dust-suppression, watering system, until shut down at noon by the
25 crusher operator. Appellants' foreran and manager worked on the site
26 until approximately 12:45 p.m. when they left the site for lunch. This

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1 left the crusher operator and several other non-supervisory employees on
2 the work site. At approximately 1:00 p.m. the crusher operator started
3 both crushers and failed to start the dust-suppression, watering system.

4 While inspecting appellants' site, respondent's inspector observed
5 dust emissions from both the "jaw" and "cone" crushers. While these
6 emissions may have intermingled at a point above the equipment, they
7 remained distinguishable due to the denser dust which appeared immediately
8 above each crusher. Appellant caused emissions aggregating at least six
9 minutes in one hour and of an opacity ranging from 90-95 percent from its
10 "jaw" crusher. Appellants caused emissions aggregating at least six
11 minutes in one hour and of an opacity of 100 percent from its "cone"
12 crusher. These emissions were observed by respondent's inspector at
approximately 1:50 p.m. and at approximately 2:00 p.m. appellants' manager
14 returned to the site. Respondent's inspector orally informed appellants'
15 manager that he had just recorded violations. The manager requested
16 that notices of violation be sent by mail. The emissions continued as
17 respondent's inspector left the site.

18 Appellants received two "Notices and Orders of Civil Penalties" each
19 citing Section 9.03(b) of Regulation I, and each imposing a civil penalty
20 in the amount of \$250. Section 9.03(b) of respondent's Regulation I
21 states:

22 After July 1, 1975, it shall be unlawful for any person
23 to cause or allow the emission of any air contaminant for a
period or periods aggregating more than three (3) minutes in
any one hour, which is:

24 (1) Darker in shade than that designated as No. 1 (20%
25 density) on the Ringelmann Chart, as published by the United
States Bureau of Mines; or

26 (2) Of such opacity as to obscure an observer's view
to a degree equal to or greater than does smoke described in

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Subsection 9.03(b)(1); provided that, 9.03(b)(2) shall not apply to fuel burning equipment utilizing wood residue when the particulate emission from such equipment is not greater than 0.05 grain per standard cubic foot.

Appellants have timely appealed both penalties to this Hearings Board.

IV

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I

In emitting an air contaminant, dust, for more than three minutes in any one hour from each of two separate emission sources, which contaminant is of an opacity obscuring an observer's view to a degree equal to or greater than does smoke designated as No. 1 on the Ringelmann Chart, appellants twice violated Section 9.03(b) of respondent's Regulation I. This is so notwithstanding the fact that such emissions were within the same hour, or simultaneous with each other.

II

Appellants assert that all of the dust emissions, visible to an onlooker, fell upon property owned or leased by appellants. Next, appellants reason that the policy of the Clean Air Act, chapter 70.94 RCW, which respondent's Regulation I implements, is to secure certain levels of air quality, RCW 70.94.011. The antithesis of this level of air quality is "air pollution" which is defined at

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1 RCW 70.94.030(2) as:

2 "Air pollution" is presence in the outdoor atmosphere
3 of one or more air contaminants in sufficient quantities and
4 of such characteristics and duration as is, or is likely to
5 be, injurious to human health, plant or animal life, or
6 property, or which unreasonably interfere with enjoyment of
7 life and property.

8 From this, appellants reason that the dust emissions, visible to an
9 onlooker, did not injure others because the visible emissions fell onto
10 appellants' employees and property. Appellants therefore conclude
11 that the opacity standard of Section 9.03(b) is beyond the scope of
12 the Clean Air Act's policy where it seeks to prohibit dust emissions
13 which, to an onlooker, appear to affect only the source owners'
14 employees or property and not other persons or their property. We
15 disagree for two reasons.

16 First, the definition of air pollution cited by appellants
17 does not specify injury to or interference with others. It includes
18 dust emissions which fall back onto the source owner and his employees.

19 Second, the visible dust emissions may have been accompanied by
20 invisible dust emissions which, being lighter in weight, are likely to
21 have exceeded the boundaries of appellants' property. These emissions
22 add their bulk to the mass of contaminants built up from similar small
23 emissions, and become the "air pollution" borne by the ambient air which
24 affects others, and which it is the policy of the Clean Air Act to
25 prevent.

26 We therefore conclude that the opacity standard of Section 9.03(b)
27 is within the scope of the Clean Air Act's policy against air pollution
28 although it prohibits both the emission of air contaminants which

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1 affect only the source owner and emissions which may affect others.

2 III

3 Appellants seek to invoke the exculpatory language of Section 9.16
4 of respondent's Regulation I which states:

5 Emissions exceeding any of the limits established by this
6 Regulation as a direct result of start-ups, periodic shutdown,
7 or unavoidable and unforeseeable failure or breakdown, or
8 unavoidable and unforeseeable upset or breakdown of process
9 equipment or control apparatus, shall not be deemed in
10 violation provided the following requirements are met:

11 (1) The owner or operator of such process or equipment
12 shall immediately notify the Agency of such occurrence,
13 together with the pertinent facts relating thereto regarding
14 nature of problem as well as time, date, duration and
15 anticipated influence on emissions from the source.

16 (2) The owner or operator shall, upon the request of the
17 Control Officer, submit a full report including the known
18 causes and the preventive measures to be taken to minimize
19 or eliminate a re-occurrence.

20 The failure of the dust suppression, watering system was entirely
21 avoidable and foreseeable inasmuch as appellants' crusher operator did not
22 turn it on. The crusher operator was, in law, a servant acting within
23 the scope of his employment and his actions bind the master, appellants,
24 notwithstanding that appellants' foreman was caught off-guard by the
25 crusher operator's behavior.

26 Furthermore, appellants' testimony showed that some 50 minutes
27 elapsed from the time that the dust emissions began around 1:00 p.m. and
28 the arrival of respondent's inspector around 1:50 p.m. The emissions were
29 in plain view of the crusher operator and several of appellants' other
30 employees yet there was neither actual notification nor a bona fide, good
31 faith attempt by appellants to notify respondent until the respondent's
32 inspector arrived at the scene, recorded violations and notified
33 appellants' foreman. There was therefore no immediate notification as
34 required by Section 9.16(1). Boise Cascade Corp. v. Puget Sound Air

1 Pollution Control Agency, PCHB No. 78-14 (1978); Edward R. Ester v. Puget
2 Sound Air Pollution Control Agency, PCHB No. 77-59 (1977); M.S. HALO v.
3 Puget Sound Air Pollution Control Agency, PCHB No. 77-99 (1977); Bethlehem
4 Steel Corp. v. Puget Sound Air Pollution Control Agency, PCHB No. 775
5 (1975); Chevron Shipping Co. v. Puget Sound Air Pollution Control Agency,
6 PCHB No. 550 (1974) and The Chemithon Corp. v. Puget Sound Air Pollution
7 Control Agency, PCHB No. 280 (1973).

8 Under these circumstances, the provisions of Section 9.16 are not
9 available to exculpate the appellants.

10 Appellants assert that the omission of the word "knowingly" from
11 Section 9.03(b) of Regulation I is an unlawful extension of the
12 statutory standards set forth in RCW 70.94.040.¹ However, the statutory
13 provision is not a "standard" in itself which can be violated, but is an
14 enforcement provision of the Act "or of any ordinance, resolution, rule
15 or regulation" which does set a standard.

16 There are five enforcement provisions of the Clean Air Act which
17 are found in RCW 70.94.040, 70.94.425, 70.94.430, 70.94.431 and
18 70.94.435. A scienter element, i.e., "knowingly," is present in
19 RCW 70.94.040.² This statutory provision was enacted in 1957.³ A
20

21 1. RCW 70.94.040 provides:

22 "Except where specified in a variance permit, as provided in
23 RCW 70.94.181, it shall be unlawful for any person knowingly to cause
24 air pollution or knowingly permit it to be caused in violation of this
chapter, or of any ordinance, resolution, rule or regulation validly
promulgated hereunder."

25 2. Ibid.

26 3. Laws of 1957, ch. 232. The provision was amended in 1967
27 substituting "70.94.181" for "70.94.180." Laws of 1967, ch. 238, § 3.

decade later, in 1967, further and different enforcement provisions were added to the Clean Air Act which included restraining orders and injunctions (RCW 70.94.425),⁴ assurances (RCW 70.94.435),⁵ and certain criminal penalties (RCW 70.94.430).⁶ In 1969 a civil penalty section

4. "Notwithstanding the existence or use of any other remedy, whenever any person has engaged in, or is about to engage in, any acts or practices which constitute or will constitute a violation of any provision of this chapter, or any rule, regulation or order issued thereunder, the governing body or board or the state board, after notice to such person and an opportunity to comply, may petition the superior court of the county wherein the violation is alleged to be occurring or to have occurred for a restraining order or a temporary or permanent injunction or another appropriate order." Laws of 1967, ch. 238, § 60.

5. Laws of 1967, ch. 238, § 62.

6. "Any person who violates any of the provisions of this 1967 amendatory act, or any ordinance, resolution, rule or regulation in force pursuant thereto, other than section 33 of this 1967 amendatory act, shall be guilty of a gross misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment for a term of not more than one year or by both fine and imprisonment for each separate violation. Each day upon which such violation occurs shall constitute a separate violation.

"Any person who wilfully violates section 33 of this 1967 amendatory act shall be guilty of a gross misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment for a term of not more than one year or by both fine and imprisonment." Laws of 1967, ch. 238, § 61.

The provision was subsequently amended in 1973 to read as follows:

"Any person who violates any of the provisions of this chapter, or any ordinance, resolution, rule or regulation in force pursuant thereto, other than RCW 70.94.205, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than two hundred fifty dollars, or by imprisonment for not more than ninety days, or by both fine and imprisonment for each separate violation. Each day upon which such violation occurs shall constitute a separate violation.

"Any person who wilfully violates any of the provisions of this chapter or any ordinance, resolution, rule or regulation in force

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1 was added to the enforcement provisions of the Act.⁷ It is important
2 to note the absence of any language such as "wilfully" both in the first
3 paragraph of RCW 70.94.430 (dealing with misdemeanors) and the first
4 paragraph of RCW 70.94.431 (dealing with civil penalties). This is in
5 marked contrast with the inclusion of "wilfully" in the second and third
6 paragraph of RCW 70.94.430 (dealing with gross misdemeanors). This
7 exclusion of the "wilful" element in some enforcement provisions and the
8 inclusion of it in others can leave no doubt that the Legislature

9
10 pursuant thereto shall be guilty of a gross misdemeanor. Each day
11 upon which such wilful violation occurs shall constitute a separate
12 offense. Upon conviction the offender shall be punished by a fine of
not less than one hundred dollars for each offense.

13 "Any person who wilfully violates RCW 70.94.205 or any other
14 provision of this act shall be guilty of a gross misdemeanor and upon
conviction thereof shall be punished by a fine of not less than one
15 hundred dollars nor more than one thousand dollars, or by imprisonment
for a term of not more than one year or by both fine and imprisonment."
(emphasis added.) Laws of 1973, 1st Ex. Sess., ch. 176, § 1.

16 7. Laws of 1969, 1st Ex. Sess., ch. 168, § 53. The first
paragraph provides:

17 "In addition to or as an alternate to any other penalty
18 provided by law, any person who violates any of the provisions of
chapter 70.94 RCW or any of the rules and regulations of the state
19 board or the board shall incur a penalty in the form of a fine in an
amount not to exceed two hundred fifty dollars per day for each
20 violation. Each such violation shall be a separate and distinct offense,
and in case of a continuing violation, each day's continuance shall be
a separate and distinct violation."

21 The foregoing provision was amended in 1973 to read as follows:

22 "In addition to or as an alternate to any other penalty
23 provided by law, any person who violates any of the provisions of
chapter 70.94 RCW or any of the rules and regulations of the department
24 or the board shall incur a penalty in the form of a fine in an amount
not to exceed two hundred fifty dollars per day for each violation.
25 Each such violation shall be a separate and distinct offense, and in
case of a continuing violation, each day's continuance shall be a
separate and distinct violation."

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1 intended to dispense with the scienter requirement where excluded as in
2 the case of the civil penalties provided in RCW 70.94.431 and with
3 which we are here concerned. This interpretation is also consistent
4 with the increasing legislative concern for clean air since 1957 as
5 evidenced by the successive provisions added to the Clean Air Act,
6 chapter 70.94 RCW. To establish liability for a civil penalty under
7 RCW 70.94.431, therefore, respondent PSAPCA need only prove that an
8 external act of appellants "violates any of the provisions of chapter
9 70.94 RCW or any of the rules and regulations of the state board or the
10 board" (such as Section 9.03(b), here). There need not be any proof of
11 scienter nor lack of reasonable care.

12 The imposition of strict liability under this regulation designed
13 to secure and maintain levels of air quality protective of human health
14 is consistent with the development of the law which imposes strict
15 liability in public welfare offenses.⁸ Kaiser Aluminum v. Puget Sound
16 Air Pollution Control Agency, PCHB No. 1017 (1976).

17 v

18 Because of the relatively short time that appellants had been
19 operating at the time of this violation and because appellants have
20 installed a dust suppression system that should work, if used, the civil
21 penalties imposed should be suspended in part.

22 In connection with the "Notice of Construction" proceedings
23 (Article 6, Regulation I) now pending for appellants' emission source,
24

25 8. See 46 A.L.R.3d 758. Cobin v. Pollution Control Board,
26 16 Ill. App.3d 958, 307 N.E.2d 191 (1974); Bath, Inc. v. Pollution
Control Board, 10 Ill. App.3d 507, 294 N.E.2d 778 (1973).

1 attention should be given to the possibility of an "inter-tie"
2 between operation of the crushers and the dust suppression, watering
3 system. This would eliminate the risk of an employee duplicating the
4 events of this case in the future.

5 VI

6 Any Finding of Fact which should be deemed a Conclusion of Law is
7 hereby adopted as such.

8 From these Conclusions, the Board enters this

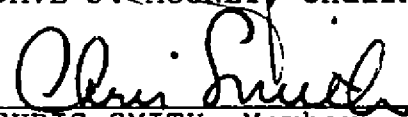
9 ORDER

10 The two \$250 civil penalties imposed by Notices and Orders of Civil
11 Penalty Nos. 3588 and 3589 are each hereby affirmed; provided, however,
12 that \$100 of each civil penalty (total \$200) is suspended on condition
13 that appellants not violate respondent's regulations for a period of
14 six months from the date of appellants' receipt of this Order.

15 DONE at Lacey, Washington, this 24th day of April, 1978.

16 POLLUTION CONTROL HEARINGS BOARD

17 
18 DAVE J. MOONEY, Chairman

19 
20 CHRIS SMITH, Member

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